

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)
)
MARC SOBEL)
)
Applicant for Certain Part 90 Authorizations)
in the Los Angeles Area and Requestor of)
of Certain Finder's Preferences)
)
MARC SOBEL AND MARC SOBEL)
d/b/a AIR WAVE COMMUNICATIONS)
)
Licensee of Certain Part 90 Stations in the)
Los Angeles Area)

To: The Commission

RECEIVED
MAR 27 1998
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

WT DOCKET NO. 97-56

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OPPOSITION TO MOTION TO STRIKE

Marc D. Sobel d/b/a AirWave Communications ("Sobel"), by his attorney, hereby opposes the *Wireless Telecommunications Bureau's Motion to Strike Reply to Opposition* filed on March 23, 1998, and ostensibly served on that day but not actually served until a day later on March 24, 1998.¹

¹ Although the Bureau filed the motion on Monday, March 23, 1998, undersigned counsel did not receive a service copy until today, i.e., Friday, March 27, 1998, by mail. Bureau counsel certified that "I have, on this 23rd day of March, 1998, sent by first-class mail, copies of the" motion to the parties, but the Bureau did not in fact mail the service copies until the next day. A copy of the envelope showing the March 24, 1998, postmark is attached for reference, and the original will be made available for inspection upon request. This is not the first time that the Bureau has misrepresented the actual service date of a document. See *Joint Motion to Strike* filed in WT Docket No. 97-56 on January 29, 1998. While a one day discrepancy may not be, in itself, significant, it does create an inconvenience for opposing counsel, especially when responsive pleading cycles are short. More importantly, it is unbecoming for the Bureau to repeatedly misrepresent even such a minor point, especially in light of the absolute standard to which it seeks to hold Sobel.

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A. Sobel's *Request* Is Not Interlocutory.

The Bureau asks the Commission to strike *Sobel's Reply to Opposition* ("*Reply*"), asserting that this is an interlocutory matter and that replies are precluded by Section 1.294(c) of the Commission's Rules and Regulations, 47 C.F.R. § 1.294(c). Sobel respectfully disagrees. The *Revised Request for Inquiry and Investigation* ("*Request*") is not interlocutory.

"Interlocutory" is defined as follows:

Provisional; interim; temporary, not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy. An interlocutory order or decree is one which does not finally determine a cause of action but only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.

BLACK'S LAW DICTIONARY 815 (6th ed. 1992). The Sobel hearing proceeding is concluded, the initial decision has been issued, exceptions to the initial decision and a reply brief have been filed, and that matter is under consideration by the Commission. As Sobel stated in both the *Request* and his *Reply*, he stands by his exceptions and the *Request* is not offered as a supplement to his appeal from the initial decision.

By the *Request*, Sobel seeks the initiation of an entirely separate proceeding pursuant to Section 403 of the Communications Act, 47 U.S.C. § 403. The caption from the hearing case was used merely as a matter of convenience because the alleged misconduct involves the Bureau's predesignation investigation of Sobel, the Bureau's role in the designation itself, and the Bureau's prosecution of the case. But this does not render the *Request* interlocutory vis-à-vis the hearing. Indeed, as Sobel recently noted, the Bureau has already taken the position that most of the matters raised in the *Request* were not relevant to and would not have been properly raised in the context of the hearing. *Reply* at ¶ 2. Something that is not even properly part of the hearing proceeding can hardly be deemed interlocutory with regard to the hearing proceeding.

B. The Bureau Has Not Itself Observed Section 1.294 of the Rules.

The Bureau grounds its motion to strike on the theory that responsive pleadings to the *Request* are governed by Section 1.294. If this is true, the Bureau has itself failed to comply with that Rule. Sobel filed the *Request* on Monday, March 2, 1998. Section 1.294(b) provides that oppositions to interlocutory requests are to be filed within four days. 47 C.F.R. § 1.294(b). Thus, the Bureau's opposition was due on or before Friday, March 6, 1998.² On March 11, 1998, Bureau counsel filed a request to extend the opposition date to Friday, March 13, 1998. The Bureau conveniently failed to disclose that its pleading was already five days (three business days) late when it first asked for the extension.

When Bureau counsel contacted undersigned counsel seeking consent to the extension request, undersigned counsel expressed confusion at the request, stating he did not believe the request was due on March 11, as Bureau counsel believed, but rather on March 12. Undersigned counsel attempted to get clarification and agreement as to the actual filing date before consenting to an extension, but Bureau counsel appeared unable or unwilling to do so. Believing that he was only consenting to a mere one day extension (from the March 12 deadline specified by Section 1.45(b) of the Rules, 47 C.F.R. § 1.45(b) to the March 13 deadline requested by the Bureau), undersigned counsel consented nonetheless. Had Bureau counsel disclosed that he believed Sobel had no right to reply, undersigned counsel certainly would not have consented to what should have been, if the Bureau were acting with full candor, a motion for leave to accept a late-filed pleading.

Accordingly, if Sobel's *Reply* is stricken pursuant to Section 1.294(c), then equity demands that the *Wireless Telecommunications Bureau's Opposition to Revised Request for Inquiry and Investigation* also be stricken as untimely.

C. The Reply Should Not Be Stricken On A Technicality.

Assuming, *arguendo*, that the Bureau is correct that this pleading cycle is governed by Section 1.294 of the Rules, Sobel respectfully requests that his *Reply* be accepted *nunc pro tunc* and be fully considered. These pleadings involve very serious charges of possible Bureau misconduct having a substantial adverse impact on Sobel's due process and other rights. This warrants full and careful consideration by the Commission, and substantive pleadings should not be sloughed off on the basis of technicalities. Indeed, if the Bureau is not held to compliance with Section 1.294(b), see Section B, *supra*, it can not complain of prejudice if the Commission accepts Sobel's reply notwithstanding Section 1.294(c)

Respectfully submitted this 27th day of March 1998,

MARC D. SOBEL d/b/a AIR WAVE COMMUNICATIONS



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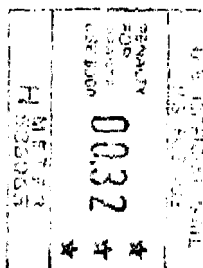
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² The Bureau was not entitled to three additional "mailing" days because Sobel hand served the *Request* on counsel for the Bureau.

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CERTIFICATE OF SERVICE

I, Robert J. Keller, counsel for Marc D. Sobel d/b/a Air Wave Communications, hereby certify that on this 27th day of March, 1998, I caused copies of the foregoing *OPPOSITION TO MOTION TO STRIKE* to be mailed to the following:

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